

# EXHIBIT 5

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF QUEENS: CRIMINAL TERM, PART K-11

3 \_\_\_\_\_X

4 THE PEOPLE OF THE STATE OF NEW YORK,

Indictment No.

5 -against-

1568-89

6 FELIPE RODRIGUEZ,

**DISMISSAL OF CONVICTION**

7 Defendant.

8 \_\_\_\_\_X

9 December 30, 2019  
10 125-01 Queens Boulevard  
Kew Gardens, New York 11415

11 B E F O R E :

12 HONORABLE JOSEPH ZAYAS,

Justice,

13  
14 A P P E A R A N C E S :

15 FOR THE PEOPLE:

16 JOHN M. RYAN, ESQ.  
17 District Attorney, Queens County,  
BY: ROBERT J. MASTERS, ESQ.  
18 Assistant District Attorney

19 FOR THE DEFENDANT:

20 THE INNOCENCE PROJECT  
21 NINA MORRISON, ESQ.

22 ZACHARY MARGULIS-OHNUMA, ESQ.  
23 260 Madison Avenue  
24 New York, New York 10016

25  
GAIL J. NEUFELD, RPR  
SENIOR COURT REPORTER

FELIPE RODRIGUEZ - Proceedings

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1 THE CLERK: On the K-11 calendar, calendar four, indictment  
2 1568 of 1989, Felipe Rodriguez.

3 Mr. Rodriguez is out and present before the Court.  
4 Counselors, your appearances, please.

5 MS. MORRISON: Nina Morrison from the Innocence Project for  
6 Mr. Rodriguez.

7 MR. MARGULIS-OHNUMA: Zachary Margulis-Ohnuma, 260 Madison  
8 Avenue also for Mr. Rodriguez who is standing next to me .

9 Good morning, your Honor.

10 MR. MASTERS: For the People, Robert J. Masters.

11 Good morning, your Honor.

12 THE COURT: Good morning, everyone.

13 Good morning, Mr. Rodriguez.

14 THE DEFENDANT: Good morning, Judge.

15 THE COURT: Mr. Masters, we will start with you.

16 Let me just remind the press I have allowed -- I did get an  
17 application for still photography, I know there is a request for  
18 videography, I have allowed it, I have already vetted the attorneys  
19 with respect to this, they have no objection; the People take no  
20 position, but just be cognizant this is a court of law, obviously do  
21 not make any noise on your end.

22 Yes, Mr. Masters.

23 MR. MASTERS: Judge, I would like to start by thanking you for  
24 accommodating the parties on such short notice and committing us to  
25 calendar on this matter here today.

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## FELIPE RODRIGUEZ - Proceedings

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1 Judge, not to bury the lead, at the request of the defendant's  
2 counsel, the People have undertaken a reinvestigation of the  
3 defendant's conviction. Ms. Morrison will more fully I think  
4 describe her efforts and the avenues that she and cocounsel have  
5 pursued over the last twelve years. The defendant has maintained  
6 his innocence since before his arrest and accordingly has asked us  
7 to review this case through the prism of actual innocence.

8 At this juncture despite an exhaustive reinvestigation of all  
9 the proceedings and transcripts, police files from two separate  
10 agencies, all the laboratory records, the medical examiner files,  
11 reinterviews with many of the witnesses including a two-day  
12 interview of the critical witness that resulted in the defendant's  
13 arrest, indictment and conviction who has since recanted his  
14 incriminating testimony as recently as 2017, I am at this point  
15 unable to find a credible basis to disturb the presumption of the  
16 defendant's guilt that attached upon the return of a guilty verdict  
17 pursuant to People versus Session, S-E-S-S-I-O-N, 34 NY 2d 254;  
18 People versus Richetti, R-I-C-H-E-T-T-I, 302 NY 230.

19 However, the reinvestigation revealed documents from the now  
20 defunct Long Island Rail Road Police which careful review of the  
21 record, as well as interviews with two former assistant district  
22 attorneys who handled the case through indictment then through  
23 trial, revealed that neither of them had ever seen the documents  
24 before and particularly a memo book entry by a Long Island Rail Road  
25 detective which would not only have served to impeach the star

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## FELIPE RODRIGUEZ - Proceedings

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1 witness, it would have provided a significant avenue to attack the  
2 thoroughness and competence of the police work resulting in the  
3 accusations that have stood all these years. It may well have  
4 provided weight to the trial counsel's efforts during the trial to  
5 nominate as many third-parties as the crime's author as possible.

6 Because the documentation of the investigation's conclusion  
7 does not appear to be in sequence or complete because the record of  
8 Rosario compliance met the standards of 30 years ago but would no  
9 longer seem to be adequate for our purposes today, I am neither  
10 comfortable or able to rely on the presumption of regularity that  
11 ordinarily attaches to these proceedings pursuant to People versus  
12 Glass, 43 NY 2d 283.

13 Rather, I have concluded something quite the opposite occurred.

14 I am satisfied that critical material, information reflecting  
15 on the guilt of the defendant existed and was in the possession of  
16 the Long Island Rail Road police. I am also satisfied that for  
17 whatever reason this information was never provided to the  
18 defendant.

19 Frustratingly, I have uncovered a Brady-type violation but one  
20 without a culprit. The fact that responsibility for this error  
21 cannot be connected to any individual or any agency does not spare  
22 the conclusion that the defendant should have gotten this material  
23 and that had he not, it undermines the validity of the conviction  
24 that was returned in 1990. That's pursuant to Brady versus  
25 Maryland, 373 US 83; Giglio versus United States, G-I-G-L-I-O, 405

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1 US 150; People versus Vilardi, V-I-L-A-R-D-I, 76 NY 2d 67; and Kyles  
2 v Whitley, 514 US 419.

3 Because of these conclusions, Acting District Attorney Ryan has  
4 authorized me to make the information available to defense counsel and  
5 to invite the motion which brings us here today. We will be joining in  
6 it and requesting the Court to grant the extraordinary relief of  
7 setting aside the defendant's conviction.

8 Furthermore, the defendant now returned to his pre-conviction  
9 status the indictment reinstated. I'll be moving to dismiss it because  
10 in light of the critical witness Javier Ramos's recantation.

11 While I don't find it to be that persuasive in the slightest bit,  
12 I could not in good faith attempt to convict the defendant again on the  
13 quality of the evidence that remains. Accordingly, at the conclusion  
14 of these proceedings, I will be moving to dismiss the indictment.

15 But first, Judge, some context is necessary.

16 The case has its origin in the November 26, 1988 murder of Maureen  
17 "Nina" Fernandez, a 35 year-old mother of three whose body was found on  
18 Thanksgiving morning in a desolate Long Island Rail Road yard in  
19 Maspeth, a reputed lovers' lane. Ms. Fernandez was partially clothed  
20 and had been stabbed 37 times. Autopsy revealed that several of her  
21 wounds were likely fatal. Additionally, evidence suggested that she  
22 had been beaten, and indeed she sustained a broken nose. Other  
23 evidence suggested that although not conclusive, evidence pointed  
24 strongly to sexual assault. Of note, Ms. Fernandez's blood alcohol  
25 level was .33.

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1           The murder resulted in an investigation undertaken by the 104  
2 precinct detective unit and the Long Island Rail Road Police. Despite  
3 the appearance of the crime scene with a great deal of blood and fresh  
4 tire tracks present, little evidence of forensic value was revealed.  
5 As a result, the investigation was propelled by evidence to piece  
6 together the deceased's movements in the hours before her remains were  
7 discovered.

8           Despite the resort to criminal profilers, the use of police  
9 sketches, the investigation was stalled from us. It was only upon  
10 tracing a car observed leaving the rail yard to a security employee of  
11 Wyckoff Heights Hospital where the deceased's daughter was being  
12 treated the evening before the murder did the investigation develop  
13 focus.

14           The investigation culminated on March 27, 1989 with the arrest of  
15 the defendant, Felipe Rodriguez based upon alleged admissions he made  
16 to his best friend, Javier Ramos. A lineup identification by Robert  
17 Thompson who had seen the deceased and the defendant together at a bar  
18 drinking to excess approximately one hour before Ms. Fernandez's  
19 estimated time of death.

20           Additionally, circumstantial evidence corroborated the  
21 identification and the evidence was complemented by a statement made by  
22 the defendant six months before his arrest that, although denying  
23 involvement in the crime, mentioned a disturbing fascination with the  
24 Wyckoff Heights Hospital morgue and a macabre interest in the bodies of  
25 homicide victims.

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1           The defendant was tried on the instant indictment in April and May  
2 of 1990 before the Honorable Ralph Sherman and a jury. He was  
3 convicted of murder in the second degree and sentenced to 25 years to  
4 life imprisonment on May 25th of 1990. The conviction has survived  
5 appellate review in both the state and federal court systems as well as  
6 collateral attack based on an alleged Brady violation.

7           The defendant was granted clemency by Governor Andrew Cuomo three  
8 years ago to the day, December 30, 2016, owing to the defendant's  
9 stellar record as an inmate. Provided an opportunity, our office  
10 voiced no opposition to the governor's action. It should be noted that  
11 the defendant had always maintained his innocence. Indeed, he was  
12 denied parole in 2014 due to his failure to voice remorse for the crime  
13 and actually declined to appear before the Parole Board in the weeks  
14 before the Governor's intervention because he could not admit remorse  
15 for a crime he claimed he had no involvement in.

16           At this point, Judge, I think it's appropriate for Ms. Morrison to  
17 detail her efforts over the past twelve years made on behalf of the  
18 defendant.

19           THE COURT: Thank you, Mr. Masters.

20           Ms. Morrison.

21           MS. MORRISON: Thank you, Judge. Thank you, Bob.

22           It is my great honor and privilege to appear here today on  
23 behalf of Felipe Rodriguez and formally present our unopposed motion  
24 to vacate his conviction and sentences.

25           This day has been a long, long time coming for all of us. It

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1 was over 32 years ago, when I was still in high school,  
2 November 1987 when Ms. Fernandez was murdered . And it was almost 30  
3 years ago in May 1990 that my client, Felipe Rodriguez, stood in  
4 this very courthouse on the third floor and heard the jury pronounce  
5 him guilty of a crime he didn't commit and to hear the judge say  
6 that he had no choice but to sentence him to the maximum 25 to life  
7 for that charge.

8 It was 13 years ago after spending many years on our very long  
9 waiting list that Felipe became an Innocence Project client and I was  
10 assigned to become his lawyer then. I was at the time pregnant with my  
11 daughter who is here today and who is now twelve years old. We took  
12 Felipe's case for a few reasons. We take only about one percent of the  
13 cases of those who write to us. One reason was it appeared there was  
14 DNA evidence that could tell us conclusively whether or not his claim  
15 of innocence was real – meaning testing DNA to prove whether or not he  
16 committed this crime.

17 The other reason was that his case had all of the hallmarks that  
18 we have seen in wrongful convictions proven by DNA evidence. As  
19 Mr. Masters mentioned, he was convicted primarily based on the  
20 testimony of a man who had himself been a suspect in the crime  
21 initially and he admitted to having given at least one false statement  
22 to police investigators early in the investigation naming another man  
23 who then acknowledged that was actually him.

24 There was one eyewitness who picked Mr. Rodriguez out of the  
25 lineup out of four who saw the lineup and that witness was both drunk

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1 and high on drugs that night. And his initial description said that  
2 the man at the bar who he saw with the victim was a stocky, white or  
3 Italian male with hazel eyes and reddish brown hair which clearly did  
4 not match Mr. Rodriguez's description.

5 Felipe himself was a devoted father of a young son. He had no  
6 arrests or convictions or history of violence towards anyone and there  
7 was no physical evidence connecting him with the crime. In fact at the  
8 time he was thinking of becoming an NYPD officer and he was in the  
9 auxillary police force.

10 So we started by searching for DNA. Some of the former law  
11 students who worked with us are now lawyers themselves and are here  
12 today. And with the cooperation of the DA's office we spent several  
13 years looking for any scrap of DNA evidence that would clear him of  
14 this crime. Unfortunately very early on we learned that almost  
15 everything that we thought to test that could have determined the  
16 killer's identity had been destroyed even before Felipe faced trial  
17 under the procedures that were in place at the time.

18 We were then fortunate enough to have several student s on the case  
19 who begged me not to close it and who said we just can't leave this man  
20 in prison, we have to keep searching. So we took a long-shot and kept  
21 looking for several years with the help of, in particular, Eric  
22 Rosenbaum, an assistant district attorney in the Queens district  
23 attorney's office.

24 Finally we found a few hairs and other items in a warehouse that  
25 got lost during Hurricane Sandy again and had been found again.

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1 Unfortunately the testing did not yield any DNA from the male so there  
2 was nothing we could do to pursue his claim of innocence with DNA.

3 At that point I managed to convince my friend and colleague ,  
4 Zachary Margulis-Ohnuma to join our case and help us and do some  
5 additional work we might need to get Felipe out of prison and we  
6 brought a clemency application to Governor Cuomo. I will always be  
7 grateful to the Governor's staff for recognizing that the fact that  
8 Mr. Rodriguez could not and would not express remorse for a crime he  
9 didn't commit, should not mean that he was not a deserving applicant  
10 for a commutation of sentence.

11 He was released from prison in January of 2017, nearly three years  
12 ago. The first client in Innocence Project history to get a  
13 commutation of sentence in New York and we continued to investigate.  
14 We made him a promise we would do everything in our power not just to  
15 free his body from prison, but to clear his record and restore his good  
16 name.

17 In 2017 Mr. Masters himself said he would investigate the case  
18 anew with fresh eyes and open dialogue . This was no small thing to  
19 agree to. He has -- as most people in this courtroom know, is no small  
20 thing, he has considerable responsibilities other than digging around  
21 in 30-year old murder cases. And we had already lost one motion to  
22 vacate, "we" meaning Mr. Rodriguez, before the Innocence Project got on  
23 the case and would have had a hard time getting back into court for  
24 another one without the DA's cooperation.

25 We worked together to create a list of missing files , for

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1 documents that we thought we needed, issues in the case. I trusted him  
2 so much that I even sent him my own internal memos on certain aspects  
3 of the case because I believed that he was going to take the evidence  
4 where it led.

5 While they were reviewing the evidence we managed to locate Javier  
6 Ramos, the main witness against Mr. Rodriguez. And when Mr. Ohnuma and  
7 an investigator spoke with him, as Mr. Masters mentioned, he admitted  
8 the testimony given at trial was a lie. Rather than go to court with  
9 that information we took it to the DA's office and let them continue to  
10 investigate as they saw fit.

11 In December of 2018 we had a big break. It turned out the NYPD  
12 files that we did not have for many years were in storage, despite both  
13 sides searching for them for some time, and over the next two years  
14 Mr. Masters I know personally as well as Detective LoVerdi had gathered  
15 and continued to review the evidence in that file. We didn't always  
16 see the issues or the facts of this case in the same light but we were  
17 candid with one another and I never doubted for a minute the commitment  
18 to get the job done and to put the time and effort needed to give  
19 Mr. Rodriguez his day in court.

20 Mr. Masters could have handed this off to someone else but he kept  
21 it and I know that with the death of Judge Brown this year it was no  
22 small thing for him to do. And I will and always will remain forever  
23 grateful to him.

24 So here is what brings us here today. A number of documents  
25 provided to us over the last two months from the police file, the Long

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1 Island Rail Road file -- I will not detail them all here, we might not  
2 get out of here before 5:00, but suffice to say it amounted to very  
3 significant Brady material that the defense appears not to have  
4 received -- I say "appears" because Felipe's trial lawyer passed away  
5 some time ago, but it was pretty clear to all of us from the record  
6 that there were certain things that she clearly did not have.

7 They directly supported the misidentification and innocence  
8 defense and further eroded the credibility of the witness , Javier  
9 Ramos. This is actually the first motion that I filed in Felipe's case  
10 since I became his lawyer 13 years ago because we were able to work  
11 this process through collaborative, or if not always quickly as we all  
12 might have liked.

13 And before I turn it over to Mr. Margulis-Ohnuma, I just want to  
14 say a few more things briefly about Felipe as a man, as a person, of  
15 course. He is a deeply religious and good man who found comfort in his  
16 faith even in the darkest of times. He has shown me how to make  
17 adversity into strength. In prison he showed kindness and comfort to  
18 those who had no one, who never had a hope of getting out of prison who  
19 knew they would probably die there. He stayed determined to be a  
20 devoted father to his son who was just three years old when he went to  
21 prison and lost his dad for the next several decades -- and he did  
22 maintain that bond, they were as close when he got out as when he went  
23 in there. He kept his faith in our case. He told me often that he  
24 didn't think it was a mere coincidence that the murder victim had the  
25 nickname of Nina which is my name and that it was a sign from God that

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1 his luck was going to turn. Even when I abandoned him to go on  
2 maternity leave three months after taking his case, he decided that my  
3 daughter must be his guardian angel and she would guide our work and  
4 she brought good luck to everything we did.

5 But he also had faith in the ordinary human beings who walked this  
6 earth; that the flawed men and women who run the legal system, and we  
7 are flawed, that we try our best. That those of us who had failed him  
8 so badly in 1990 and then the decades that followed would nonetheless  
9 some day bring the truth to light and acknowledge the grief he had to  
10 live through.

11 And it is my honor and privilege to stand beside him on the day  
12 that once again vindicates his faith.

13 THE COURT: Mr. Ohnuma.

14 MR. MARGULIS-OHNUMA: Thank you very much, your Honor.

15 I think at this time we move pursuant to 440.10(G) and (H) to  
16 vacate the conviction and dismiss the indictment.

17 I will say a couple words if I may about my involvement in the  
18 case. Most of all I want to express gratitude both on behalf of  
19 my client and personally to the Queens County District Attorney's  
20 office, your Honor, to the Court, most of all the Innocence Project.  
21 The work they do is incredibly resource intensive and these cases  
22 kind of really can't happen without them. Very grateful to be a  
23 part of one that ended up successful and I think we all owe a real  
24 debt of gratitude to the Innocence Project for what they do.

25 When Nina came to me five years ago I reviewed the file. I think

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1 there was a central observation that I made that's relevant to  
2 Mr. Masters's remarks which is whether or not Javier Ramos was telling  
3 the truth, there was no connection whatsoever between the car the  
4 police had identified and the murder. There was no biological evidence  
5 as the Innocence Project's hard work had revealed inside the car.

6 The Prosecutor's closing statement was that the murder happened  
7 inside the car because that was consistent with Javier Ramos's false  
8 statement. So with that central observation, we could go forward and  
9 investigate it and build brick by brick with hard work, paralegal after  
10 paralegal both from my office, associates in my office, paralegals at  
11 the Innocence Project and Nina and I overseeing it all and putting it  
12 together and knowing what we were looking for in the material that was  
13 turned over last month. And I am so grateful to the Innocence Project,  
14 to Felipe and the Queens County District Attorney's office for putting  
15 us there.

16 I also want to echo what Ms. Morrison said. You cannot imagine a  
17 more thoughtful, diligent, heartfelt, unbiased person than Felipe  
18 Rodriguez. I mean he has gone through what none of us can ever imagine  
19 and he has done it with entire and complete grace. Today was really  
20 the first time he has ever been late in my experience.

21 MS. MORRISON: That was because of an accident on the freeway  
22 for the record.

23 MR. MARGULIS-OHNUMA: So for all those reasons, Mr. Rodriguez  
24 moves pursuant to CPL 440.10 to vacate the conviction.

25 MR. MASTERS: Judge, in the interest of fairness and candor,

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1       our basis for rejecting the defendant's claim of actual innocence is  
2       based on the rejection of Mr. Ramos's recantation, for just as his  
3       testimony was necessary to commence the prosecution, crediting his  
4       recantation would be necessary to erase the notion of the  
5       defendant's innocence.

6               The legal prism through which this recantation must be viewed  
7       informs my conclusion. The time-honored legal principles regarding  
8       his recantations have this famous quote from the Court of Appeals  
9       seminal decision from 1916, *People versus Shilitano*,  
10       S-H-I-L-I-T-A-N-O, 218 NY 161: Therein Judge Samuel Seabury wrote  
11       this oft-cited principle: There is no form of proof so unreliable  
12       as recanting testimony. In the popular mind it is often regarded of  
13       great importance. Those experienced in the administration of  
14       criminal law know well its untrustworthy character.

15              I don't wish to belabor my conclusions regarding Mr. Ramos. He  
16       was kind enough to be flown here from out of state and be  
17       interviewed in the presence of his own attorney over two days by  
18       myself, by Sergeant LoVerdi of my office and former Assistant  
19       District Attorney David Dikman who took Mr. Ramos's sworn  
20       incriminating statement on March 27th of 1989 and adduced an even  
21       more detailed version before the grand jury which indicted the  
22       defendant two days thereafter.

23              But as a result of my reinvestigation I must say that I remain  
24       singularly unpersuaded by Mr. Ramos's recantation. Sergeant LoVerdi  
25       and Mr. Dikman share my opinion. Apart from the suspect view of



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1 recantations provided by our common law, Mr. Ramos's recantation is  
2 entirely devoid of logic, adequate recall and appears to be  
3 motivated in part by intense animus towards the police. Indeed,  
4 Mr. Ramos's trial testimony, although extensively challenged was,  
5 supported by internal logic which his current version fails to  
6 approach. Accordingly, the defendant's conviction, although hardly  
7 based on overwhelming evidence, remains presumptively valid and  
8 based on adequate evidence supported by credible circumstantial  
9 evidence. Therefore it is my opinion that the claim of actual  
10 innocence cannot be accepted as it is almost entirely based upon  
11 Mr. Ramos's claims.

12 But the basis of the action we take today is a discovery  
13 violation, your Honor. Some detail of that violation and its  
14 relevance I believe is necessary. Because Ms. Fernandez's body was  
15 discovered at a Long Island Rail Road yard, their police extensively  
16 participated in the investigation. The lead agency who was the NYPD  
17 in the case was investigated out of the 104 precinct detective unit.  
18 The investigation commenced on November 26 th of 1987. It changed  
19 hands on April 1st of 1988 when the first NYPD detective retired and  
20 it was assigned to another. From the commencement of this case  
21 until October 1 of 1988, there are 212 numbered DD-5s. More than  
22 half authored by two Long Island Rail Road detectives assigned to  
23 the system now. However over the last six months of the  
24 investigation pendency there are approximately only an additional  
25 three to five DD-5s, and none of them are numbered.

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1           The documentation concludes with the events of March 27<sup>th</sup> of  
2           1989, that is the reinterview of Mr. Ramos, his identification of  
3           the defendant as the car's borrower and the author of the  
4           incriminating admissions previously described as well as DD-5s  
5           documenting the preparation of a taped statement – a typed  
6           statement made by ADA Dikman, the coordinated efforts of the  
7           83rd precinct auxiliary police to have the defendant available to be  
8           taken to custody, as well as the lineup identification by  
9           Mr. Thompson. Subsequent DD-5s note the enlisting of Lifecoder in  
10          an attempt at DNA testing on the car seat covers which yielded  
11          nothing.

12           Any objective review of the investigator files are concerning.  
13          The most critical portions of the investigation, indeed were most  
14          sparingly documented. Were the paucity of the documentation the  
15          only issue revealed in our review of this matter, I would not  
16          recommend disturbing this conviction; however, it is clear that  
17          although the Long Island Rail Road police were utilizing NYPD DD-5s  
18          to document their work, simultaneous reports were filled out to  
19          explain their activity to justify overtime and progress in the case.  
20          Inconsistencies in their paperwork are apparent and it seems  
21          inconceivable they would not have been the subject of  
22          cross-examination, particularly considering the defense trial  
23          strategy.

24           However most troubling and decisive is the discovery of a  
25          photocopy of a memo book identified as having been written by

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1 Detective Sullivan of the Long Island Rail Road police. The  
2 handwritten note states: Rodriguez showed up at Ramos 's house  
3 6:00 A.M. Thanksgiving morning with male black friend , 25 years old,  
4 slim, dark-skinned black.

5 Sullivan has no memory of it. NYPD Detective Beisel never saw  
6 it and candidly admits he would have pressed for an identification  
7 of the male black. Concerned that he could have been an additional  
8 witness against the defendant but also a potential accomplice to the  
9 crime or perhaps even the actual perpetrator.

10 An examination of the trial record reveals no hint it was in  
11 counsel's possession. It is unimaginable that a defense strategy of  
12 nominating as many candidates for this crime 's commission as  
13 possible would not have premiered this statement to establish that  
14 and to cast doubt on the investigation's failure to pursue such a  
15 significant lead. As a result, I am persuaded these materials were  
16 not provided to the defendant. That conclusion was only  
17 strengthened by that conversation with former ADAs Dikman and Safran  
18 who tried the case. Neither ever saw these materials and both would  
19 have taken steps to address their significance and relevance.

20 Judge, while analyzing what I had uncovered I came across a  
21 decision published in last Monday's Law Journal. It was actually from  
22 the First Department hand downs of December 19th of 2019, People versus  
23 Darrin McGhee, M-C-G-H-E-E, 2019 Westlaw 6902810, an opinion written by  
24 Judge Mazzairelli. It opens by saying: The Brady rule is based on the  
25 requirement of due process and its purpose is not to displace the

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1 adversary system as the primary means by which truth is uncovered but  
2 to ensure that the accused receives a fair trial. Here the People  
3 admittedly failed to disclose a witness statement that could have aided  
4 the defense in attempting to impeach the only eyewitness to the  
5 shooting in question and that could have opened up an additional avenue  
6 investigation. Indeed where the information gathered if true would  
7 have directly contradicted the People's theory of the case, it must be  
8 considered Brady.

9 Judge, that holding is familiar to all of us but I think the  
10 articulation is particularly apt to the case before us. In sum, the  
11 information, particularly that memo book entry, though its author  
12 theorized that Ramos promptly walked back what it was that he said  
13 those details, he admits is pure conjecture, Sullivan does, and it has  
14 no impact ultimately on the legal analysis. It was favorable to the  
15 defendant. Very favorable. On a number of planes it would have  
16 impeached Mr. Ramos. It would have impeached the detective. It would  
17 have impeached the entire investigation. It would have lent support  
18 for the defense theory of another perpetrator. Because it was  
19 favorable, it was our obligation to get it into the defendant's hands.

20 That I cannot fairly accuse or blame anyone, that I have no  
21 culprit for this mistake, doesn't in any way alleviate our  
22 responsibility not to make it in the first place. Nor does it mitigate  
23 the legal impact of what occurred. I cannot offer a defense to these  
24 based on materiality. Based upon my entire career only working within  
25 the practice of criminal law it would have been a different trial had

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1 this piece of paper been made available and no one would have been  
2 surprised by a different verdict.

3 Because of that I am compelled to join in the motion . Because  
4 Mr. Ramos's current disposition and his version now , I can neither  
5 retry the case or let the indictment stand.

6 On a personal note I must thank defense counsel and the defendant  
7 for the patience that they showed us during this long journey that's  
8 gone on for several years. I must also thank Sergeant LoVerdi for his  
9 remarkable devotion in the investigation as well as all the retired  
10 detectives and former ADAs. They took my calls, they answered my  
11 questions, admitted that which they could and recognized where time had  
12 eroded their memories.

13 Finally I recognize, frustratingly, I provide a conclusion that is  
14 in some ways unsatisfying to everyone: To the defendant I cannot lift  
15 the cloud of suspicion but I can lift the burden of his conviction.

16 To everyone who worked so hard on this case 30 years ago, I have  
17 ultimately disturbed the satisfaction that they felt from achieving  
18 justice in such a difficult case.

19 For the deceased's family, I have taken the closure that our  
20 system tries to provide to all families of deceased. That I have taken  
21 that from them.

22 And for Maureen Fernandez, I have now terminated her case without  
23 a conclusion. I pray that her eternal slumber is not disturbed as a  
24 result.

25 To Mr. Rodriguez, a last order of business is due: Guilty or not,

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1 you were entitled to that information. Accused of murdering a young  
2 mother of three, you were owed the best the criminal justice system  
3 could provide. Not perfection because no system can accomplish that,  
4 but when things were cut in your favor should find their way in your  
5 attorney's hands, that seems not to have happened here and for that I  
6 am sorry.

7 Because it didn't, we take the action we do now and we take today.  
8 Judge, I move and join in the motion to set aside the conviction  
9 pursuant to CPL 440. Upon that being granted I will move to dismiss  
10 this indictment against the defendant.

11 THE COURT: Thank you, Mr. Masters.

12 I understand that Mr. Felipe Rodriguez would like to make a  
13 statement.

14 THE DEFENDANT: Yes.

15 THE COURT: Mr. Rodriguez.

16 THE DEFENDANT: Thank you, your Honor.

17 First and foremost I want to thank God for allowing me to be  
18 here today. Thank you, your Honor, Mr. Masters, thank you for all  
19 your work.

20 There is no doubt in my life this day would come. There is no  
21 question that there was a crime committed and I hope and pray that  
22 one day whoever did commit the crime can be found or maybe his  
23 conscience can make him come forward. Either that or anything else  
24 that is going to show what happened on that Thanksgiving morning.

25 My son was three years old.

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1 THE COURT: By the way, I know that your son was on his way.  
2 Has he arrived?

3 THE DEFENDANT: He is here.

4 He is big now. Bigger than me. But if it wasn't for Nina  
5 Morrison and Zack and all their efforts, the fact that I probably  
6 would have still been in prison the rest of my days, I want to thank  
7 the supervisor, I want to thank Arthur Browne who worked hard on  
8 this case. I want to thank Father Ogbunna who is here today who  
9 actually counseled me in prison and helped me become the man that I  
10 am today. Part of hope right here in court. I am grateful for all  
11 the attention he gave me. It's too many people that I got to thank  
12 and I think the list is so long so I'm not going to tire the Court  
13 with that. But I want to thank everybody: My family, my wife, my  
14 kids.

15 It's hard to come out of prison after 27 years and not be  
16 angry, sometimes to act natural. And my wife put up with it and she  
17 has helped me greatly. I am really grateful to my wife and my kids  
18 mostly and thank you.

19 THE COURT: Mr. Rodriguez, I think it's important for the Court  
20 to acknowledge that sometimes the criminal justice system makes  
21 mistakes.

22 THE DEFENDANT: Thank you.

23 THE COURT: Sometimes the defense attorney makes mistakes,  
24 sometimes the Court makes mistakes -- not this Court but some courts  
25 might make mistakes -- even this Court makes mistakes, and sometimes

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1 the prosecutor makes a mistake. And sometimes these mistakes are  
2 minor and do not effect a defendant's right to a fair trial and  
3 sometimes these mistakes are consequential, monumental and they do  
4 in fact deprive a defendant of his right to a fair trial.

5 What is important to me is that we have a criminal justice  
6 system that is self-reflective, that is willing to look in the  
7 mirror, to look inward so that we can quickly correct miscarriages  
8 of justice when they occur.

9 Now in your case, Mr. Rodriguez, the miscarriage of justice  
10 took way too long to discover and it took an act outside of the  
11 criminal justice system, the governor's, Governor Cuomo's  
12 commutation of your life sentence and release from prison after 27  
13 years. Mr. Rodriguez, you deserve better than that. Yet it seems  
14 from everything I'm hearing that you never lost faith and you are  
15 lucky enough, you are blessed enough to have the Innocence Project  
16 take up your cause and lucky enough to have the District Attorney's  
17 office reinvestigate your case and discover that there were indeed  
18 some documents in your case, some Brady material, some evidence that  
19 was favorable to you which would likely have affected the jury's  
20 verdict.

21 The miscarriage of justice in your case, Mr. Rodriguez, took  
22 too long to discover and I regret that, but I am glad that we  
23 finally got here even though I recognize that, as Mr. Masters said,  
24 this brings no comfort or solace to the victim's family or to your  
25 beautiful family – I just became familiar with this case in the

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1 last week or so. I did not preside over Mr. Rodriguez's trial or  
2 his earlier motion to vacate his conviction. Nevertheless, I do  
3 wish to thank the Innocence Project, Ms. Morrison and  
4 Mr. Margulis-Ohnuma, for their work on this case and the work they  
5 do generally in this area as well as the District Attorney's office,  
6 Mr. Masters and acting District Attorney Jack Ryan for  
7 reinvestigating the case after the Governor commuted your sentence .

8 So I say simply to you: Good luck to you, Mr. Rodriguez, the  
9 motion to vacate the conviction is granted and the indictment is  
10 hereby dismissed. I will seal -- I will stay sealing until I have  
11 an application to seal the conviction. And again, good luck to you,  
12 sir. Thank you.

13 THE DEFENDANT: Thank you.

14 MR. MASTERS: Thank you.

15 \* \* \* \* \*

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17  
18 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF  
19 THE ORIGINAL STENOGRAPHIC MINUTES TAKEN OF THIS  
20 PROCEEDING.

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22   
23 GAIL J. NEUFELD, RPR  
24 Official Court Reporter  
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